

STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
The Hon. Donald S. Owens, Stephen L. Borrello, and Cynthia Diane Stephens

POWER PLAY INTERNATIONAL, INC.,
and GORDON HOWE,

Plaintiffs-Appellees,

v

DEL REDDY, AARON HOWARD,
MICHAEL REDDY and IMMORTAL INVESTMENTS, L.L.C.,

Defendants-Appellants,

and

AARON HOWARD, MICHAEL REDDY and
IMMORTAL INVESTMENTS, L.L.C.,

Defendants/Counter-Plaintiffs-Appellants,

v

POWER PLAY INTERNATIONAL, INC.,
and GORDON HOWE,

Plaintiffs/Counter-Defendants-Appellees.

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DEFENDANTS-APPELLANTS' SUPPLEMENTAL BRIEF

Dated: January 20, 2017

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INTRODUCTION

Defendants-Appellants Del Reddy, Aaron Howard, Michael Reddy, and Immortal Investments, L.L.C. (“Defendants”) seek leave to appeal from the July 26, 2016 opinion of the Court of Appeals, which affirmed in all respects a September 25, 2014 Judgment in favor of Plaintiffs-Appellees Power Play International, Inc. and Gordon Howe (“Plaintiffs”). This litigation arises out of Defendants’ alleged breach of a November 10, 2008 Settlement Agreement. Defendants identified three issues in their Application to this Court. Two of those issues related to Howard Baldwin – the critical damages witness proffered by Plaintiffs. More specifically, Defendants contend that Plaintiffs proffered Mr. Baldwin as a damages expert, and that the trial court failed to perform its gatekeeper function where Mr. Baldwin (1) lacked a proper factual basis for his testimony, (2) lacked the necessary qualifications pursuant to MRE 702 to testify as a valuation expert, and (3) was going to confuse the jury with irrelevant testimony regarding a vague “movie deal” that he supposedly had or was going to have with the Plaintiffs. (10/3/12 trans, pp 23-28; 3/13/13 trans, pp 6-7.) Defendants further contend that the trial court erred by *sua sponte* limiting Defendants’ ability to impeach Mr. Baldwin at trial with his deposition transcripts. (6/14/13 trans, pp 100-101; 1/14/15 trans, pp 5-6.) The Court of Appeals avoided meaningful review of these issues through a combination of re-characterizing Mr. Baldwin as a lay witness, and labeling any error as “harmless.”

The third issue in Defendants’ Application relates to the post-trial award of attorney fees to the Plaintiffs pursuant to a clause in the Settlement Agreement. Because the attorney fees were awarded under contractual provisions, they are considered damages, not “costs.” *Central Transport, Inc v Freuhauf Corp*, 139 Mich App 536, 548; 362 NW2d 823 (1984). As such, Plaintiffs were required to plead the attorney fees in the Complaint *and introduce evidence at trial* to support their contract claim. Stated differently, a party claiming a right to recover

attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a *prima facie* case and avoid a directed verdict. See *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 196; 555 NW2d 733 (1996). Here, Plaintiffs made no reference to, and proffered no evidence regarding, their attorney fee claim at trial. By allowing Plaintiffs to advance their contractual attorney fee claim through a post-trial motion, the Court of Appeals reached a result that cannot be reconciled with *Pransky v Falcon Group, Inc*, 311 Mich App 164, 194-195; 874 NW2d 367 (2015).

Pransky, 311 Mich at 194-195 states that in “order to obtain an award of attorney fees as damages under a contractual provision ... the party seeking payment must sue to enforce the fee-shifting provision, as it would for any other contractual term.” Unlike “statutorily permitted or rules-based attorney's fees, contractually based attorney's fees form part of the damages claim. That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party.” *Id.* *Pransky* held that “because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the contract. ... A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding.” *Id.* This is a precedentially binding decision that the panel here was required to follow. MCR 7.215(J)(1).

On December 9, 2016, this Court directed the Clerk “to schedule oral argument on whether to grant the application or take other action.” (Ex. A.) The same order directed the parties to “file supplemental briefs ... addressing whether the trial court erred in awarding attorney fees following a postjudgment hearing rather than submitting the attorney fee issue to the jury.” (*Id.*)

ARGUMENT

Plaintiffs were not entitled to attorney fees under the Settlement Agreement, where such fees were an element of their alleged breach of contract damages, and Plaintiffs failed to proffer evidence of attorney fees at trial.

With limited exceptions, the so-called “American Rule” prohibits the award of attorney fees to the prevailing party in a lawsuit. *Wyandotte Elec Supply Co v Elec Tech Sys, Inc*, 499 Mich 127, 150; 881 NW2d 95 (2016). The exceptions to this general rule include those situations in which fees are authorized by statute, court rule or the common law. *Id.* Another recognized exception to this general rule exists where fees are allowed under a contract entered into by the parties. *Id.* This contractual exception to the “American Rule,” like all other exceptions to that rule, is “narrowly construed.” *Fleet Business Credit L.L.C. v Krapohl Ford Lincoln Mercury*, 274 Mich App 584, 589; 735 NW2d 644 (2007). See also *Wyandotte Elec*, 499 Mich at 150 (“attorney fees are not to be awarded unless *specifically provided*”) (emphasis in original); *Haliw v Sterling Heights*, 471 Mich 700, 707; 691 NW2d 753 (2005) (“the American Rule permits recovery of fees and costs where *expressly authorized*”) (emphasis in original).

Paragraph 5 of the November 10, 2008 Settlement Agreement provides in relevant part, “The prevailing party in any proceeding to enforce this agreement, or any remedy contemplated by this Agreement, shall be entitled to recover, in addition to any other remedy, actual costs and attorney fees incurred in the enforcement.” (Plaintiffs’ Answer to Application, pp 21, 33.)¹ This language makes clear that attorney fees are one of multiple remedies that a party may recover for a breach of the Settlement Agreement.

¹ Paragraph 12 of the Settlement Agreement also mentions attorney fees as follows: “Should any party commence litigation relating to this Agreement, the prevailing party shall be entitled to an award of actual costs and attorney fees from the opposing party against whom it prevailed.” (See Ex. B, Plaintiffs’ Motion for Entry of Judgment, p 2.)

As noted above, under Michigan law, attorney fees to be awarded pursuant to a contractual provision are damages, not costs. *Pransky*, 311 Mich App at 194; *Fleet Business Credit*, 274 Mich App at 589; *Central Transport*, 139 Mich at 548; 362 NW2d 823 (1985); *Wilson Leasing Co v Seaway Pharmica Comp*, 53 Mich App 359; 220 NW2d 83 (1974). Contractual attorney fees should, therefore, be treated like any other damages that may be claimed or awarded to a party. Since such fees represent an element of a party's damages, it is incumbent on a party seeking to recover contractual fees to present any claim for such fees to the trier of fact.

The Court of Appeals has emphasized in a number of cases that a party that does not present evidence at trial as to contractual attorney fees risks the fate of any party who fails to present evidence at trial on an element of damage – the entry of a directed verdict. For example, in *Zeeland Farm Services*, 219 Mich App at 196, the panel held that “[a] party claiming the right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a prima facie case and to avoid a directed verdict.” See also *Citizens National Bank of Cheboygan v Mayes*, 133 Mich App 809, 813; 350 NW2d 809 (1984) (holding that contractual attorney fees were properly denied because “Plaintiff should have presented this issue to the jury during its presentation of evidence on the damages issue....”).

Two unpublished Court of Appeals opinions are particularly instructive and, although non-binding, warrant consideration under MCR 7.215(C)(1) as amended effective May 1, 2016. The first of these is *T-Craft, Inc v Global HR*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 2010 (Docket No. 285916), p 3 (Ex. C). In *T-Craft*, the panel noted that “[a]ttorney fees awarded under a contractual provision that entitles a prevailing party to recover its attorney fees are considered general damages rather than taxable costs.” *Id.* at 3. For this reason, “a party claiming a right to recover attorney fees under a contract must introduce

evidence of the reasonableness of the attorney fees to establish a *prima facie* case and avoid a directed verdict.” *Id.* Because the *T-Craft* plaintiffs did not present “evidence at trial to support their request for contractual attorney fees,” the trial court properly denied their “post-judgment motion for attorney fees.” *Id.* Similar to the plaintiffs in *T-Craft*, the Plaintiffs here neither asserted, nor presented any evidence at trial to support, their request for attorney fees based on the subject contract. Simply put, Plaintiffs never introduced any evidence at trial to support a *prima facie* case for attorney fees as an element of their claim for breach of contract.

The second is *Barton-Spencer v Farm Bureau Life Ins Co of Michigan*, unpublished opinion per curiam of the Court of Appeals, issued March 22, 2016 (Docket No. 324661), p 13 (Ex. D),² where the panel thoroughly analyzed this question and found reversible error based upon a trial court’s decision to award contract-based attorney fees through a post-trial motion. The following portion of that opinion is particularly germane and echoes Defendants’ position here:

Although Farm Bureau adduced evidence to support the reasonableness of its claimed attorney fees, **it did so in postjudgment motion proceedings before the trial judge, not during the jury trial.** Barton–Spencer objected, arguing that she was entitled to a jury trial regarding the reasonableness of the attorney fees sought. Without deciding whether Barton–Spencer was entitled to a jury trial, the trial court nevertheless granted Farm Bureau's motion.

By doing so, the trial court erred. Barton–Spencer demanded a jury trial on *all* issues so triable.^[3] “A right to a jury trial can exist either statutorily or constitutionally.” *Madugula v. Taub*, 496 Mich. 685, 696; 853 NW2d 75 (2014). Article 1, § 14 of Michigan's 1963 Constitution provides, “The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law.” Under the

² Leave applications pending, Docket No.s 153655 & 153656.

³ Likewise, Defendants here requested a jury trial on all issues. (Ex. E, pp 9, 17).

above provision, a party in a civil case has a constitutional right to a jury trial “[i]f the nature of the controversy would have been considered legal at the time the 1963 Constitution was adopted,” but no such right exists “if the nature of the controversy would have been considered equitable[.]” *Madugula*, 496 Mich. at 705–706. “[W]e must consider the relief sought as part of the nature of the claim to determine whether the claim would have been denominated equitable or legal at the time the 1963 Constitution was adopted.” *Id.* at 706.

The contractual attorney fees sought by Farm Bureau were damages, see *Fleet*, 274 Mich App at 590–592, and “claims for money damages were generally considered legal in nature at the time the 1963 Constitution was adopted,” *Madugula*, 496 Mich. at 713. Moreover, our Courts have long recognized, in cases decided both before 1963 and afterward, that an action for damages for a breach of contract is historically an action at law, not in equity. Furthermore, settled precedent indicates that the reasonableness of the contractual fees sought is a question that may be properly decided by a jury. ... Thus, we conclude that Barton–Spencer was entitled to have the issue decided by a jury rather than the trial court. *Barton-Spencer*, unpub op at 13 (emphasis added, citations omitted).

The panel went on to explain why certain contractual language (not relevant here) did not waive Barton-Spencer’s right to a jury trial on the fee issue. The fee issue was remanded, but only because Farm Bureau was independently entitled to some portion of its attorney fees under the case evaluation rule (an issue not presented here). The panel expressly threw out the award of attorney fees *under the contract*.

Although likewise non-binding, *Dryvit Sys, Inc v Great Lakes Exteriors, Inc*, 96 Fed App’x 310, 311–312 (6th Cir 2004) is also highly instructive. In *Dryvit* the panel – applying Michigan law in diversity – held that *res judicata* prevented the prevailing defendant in an earlier breach of contract suit from filing a new suit for attorney fees, based on the same contract. The panel noted that “[t]ypically, attorney’s fees are collateral to the merits and awarded after judgment by ... motion. However, in Michigan, attorney’s fees awarded by a ‘prevailing party’ contract clause are considered damages, not costs, ... and therefore are not collateral to the

merits.” *Id.* at 311 (citations omitted). “Thus, the correct procedure is to plead the attorney’s fees *at trial*.” *Id.* (emphasis added). The panel rejected Dryvit’s argument “that the prevailing party is not determined until the final judgment, so its claim could not accrue until then.” *Id.* at 311-312.

The panel here accepted the reasoning that the *Dryvit* panel rejected. *Power Play Int’l v Del Reddy, et al.*, unpublished opinion per curiam of the Court of Appeals, issued on July 26, 2016 (Docket No. 325805), p 14 (Ex. 1 attached to Application). The panel here found: “In this case, plaintiffs could not prove at trial that they were entitled to attorney fees or the reasonableness of those fees, where the contract explicitly states that a party cannot recover attorney fees until they prevail in the action to enforce the agreement. Plaintiffs did not prevail in the action to enforce the agreement until the jury decided the issue of damages.” *Id.* The problem with this reasoning is that every element of damages presupposes that the *prima facie* elements of the claim are established at trial. For example, a tort claimant’s damages presupposes that he or she “prevailed” on the issues of duty, breach, and causation. No one says that the plaintiff could not adduce evidence of damages in a tort case until breach of duty has been established. But here, because the attorney fee claim was an element of the Plaintiffs’ breach of contract, the Court of Appeals said exactly that.

Moreover, there is a fundamental difference between attorney fees awarded for damages as a breach of contract, and attorney fees awarded under a statute or court rule: courts are bound

by the plain language of those statutes and court rules,⁴ and the plain terms of the most commonly invoked fee-shifting provisions expressly provide for the award of fees *through post-trial motions*. See, for example, MCR 2.403(O)(8) (“A request for costs under this subrule must be filed and served within 28 days *after the entry of the judgment* or entry of an order denying a timely motion (i) for a new trial, (ii) to set aside the judgment, or (iii) for rehearing or reconsideration.”) (emphasis added); MCR 2.405(D)(6) (same). Attorney fees are awarded under the No-Fault Act “in addition to the benefits recovered,” MCL 500.3148(1), meaning that under the statute’s plain language there must have already been a separate determination by a fact finder in order for the requisite “recovery” to exist. Attorney fees as a sanction for frivolous suits are likewise specifically sought by motion. MCR 2.625(A)(2) (“on motion of a party....”); MCL 600.2591(1) (“upon motion of a party....”). See also *Yuhase v Cty of Macomb*, 176 Mich App 9, 15; 439 NW2d 267 (1989) (explaining that attorney fees under state civil rights statutes are, in light of “the legislative purposes involved,” recoverable “in a posttrial ... hearing motion”). This is also reflected in the Court of Appeals’ “final order rule.” MCR 7.202(6)(a)(iv) (“a postjudgment order awarding or denying attorney fees and costs under MCR 2.403, 2.405, 2.625 or other law or court rule”; no mention of contract-based fee awards). And see

⁴ Court rules are interpreted using the same principles that govern statutory interpretation. *Haliw*, 471 Mich at 704. “The rules governing statutory interpretation apply equally to the interpretation of court rules. If the plain and ordinary meaning of the language employed is clear, then judicial construction is neither necessary nor permitted, and unless explicitly defined, every word or phrase should be accorded its plain and ordinary meaning, considering the context in which the words are used.” *Hyslop v Wojjusik*, 252 Mich App 500, 505; 652 NW2d 517 (2002). Under ordinary principles of statutory interpretation, courts may not “rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature.” *DiBenedetto v West Shore Hosp*, 461 Mich 394, 405; 605 NW2d 300 (2000). Courts have “no authority to add words or conditions to [a] statute.” *Rowland v Washtenaw Co Rd Comm*, 477 Mich 197, 214 n 10; 731 NW2d 41 (2007). “[T]he policy behind a statute cannot prevail over what the text actually says. The text must prevail.” *Elezovic v Ford Motor Co*, 472 Mich 408, 421-422; 697 NW2d 851 (2005).

42 USC 1988(b) (“the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney’s fee *as part of the costs*”) (emphasis added); Fed R Civ P 54(d)(2) (“A claim for attorney’s fees and related nontaxable expenses *must be made by motion* unless the substantive law requires those fees to be proved at trial as an element of damages.”) (emphasis added).

CONCLUSION AND RELIEF SOUGHT

Assuming this Court does not grant leave and/or order a new trial based on either of the first two arguments in Defendants’ Application, the September 11, 2014 Opinion and Order, which awarded \$80,765.00 in attorney fees to the Plaintiffs, must be vacated and the Judgment should be reduced accordingly. Plaintiffs were required to plead the attorney fees in the Complaint *and introduce evidence at trial* to support their contract claim. Stated differently, a party claiming a right to recover attorney fees under a contract must introduce evidence of the reasonableness of the attorney fees to establish a *prima facie* case and avoid a directed verdict. Plaintiffs’ response to this argument rests on the notion that because they pled a claim for attorney fees, no trial proofs were required. Plaintiffs’ position is not consistent with Michigan law. It is the equivalent of a tort claimant pleading the *prima facie* elements of a negligence case but failing to adduce any evidence of breach at trial.

Additionally, the Court of Appeals reached a result here that cannot be reconciled with *Pransky*, 311 Mich App at 194-195, which states that unlike “statutorily permitted or rules-based attorney’s fees, contractually based attorney’s fees form part of the damages claim. That is, the party seeking the award of attorney fees as provided under the terms of an agreement must do so as part of a claim against the opposing party.” *Pransky* held that “because the award of attorney fees was not authorized by statute or court rule, but was instead part of a contractual agreement, the trial court could only award the fees as damages on a claim brought under the

contract. ... A trial court may not enter judgment on a claim that was not brought in the original action in the guise of a postjudgment proceeding.” *Id.* Here the trial court did precisely what *Pransky* says it could not.

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